U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: June 12, 2003

BALCA Case No.: **2002-INA-93**
ETA Case No.: P1999-CA-09442774/ML

In the Matter of:

MY PLACE RESTAURANT,
Employer,

on behalf of

JOSE JIMENEZ,
Alien

Appearances: Carlos Vellanoweth, Esquire

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a restaurant for the position of Cook. (AF 59-60).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer=s request for review, as contained in the Appeal File. (AAF@).

STATEMENT OF THE CASE

On January 30, 1997, Employer, My Place Restaurant, filed an application for alien employment certification on behalf of the Alien, Jose Jimenez, to fill the position of Cook. Minimum requirements for the position were listed as two years experience in the job offered. (AF 50).

Employer received five applicant referrals in response to his recruitment efforts, all of whom were rejected as either disinterested in or unavailable for the position. (AF53-54).

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[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. **' 1182(a)(5)(A) and 20 C.F.R. Part 656.**

[2] **AAF@ is an abbreviation for AAppeal File.@**

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on May 31, 2001, proposing to deny labor certification based upon a finding that Employer had made an insufficient recruitment effort. The NOF advised that there was insufficient evidence Employer=s effort to contact the five qualified applicants took place. Employer was instructed A[i]f you contend this conclusion is inaccurate, submit a rebuttal giving details of your attempt(s) to interview the U.S. applicants.@(AF 46-48).

In Rebuttal, Employer submitted copies of letters and documentation of prior recruitment efforts from the previous and present employers, and discussed how invaluable the Alien is to his business and why it is so difficult to find a qualified worker. (AF 6-45).

A Final Determination denying labor certification was issued by the CO on August 23, 2001, based upon a finding that Employer had failed to adequately document his recruitment effort. The CO found Employer=s rebuttal unresponsive to the NOF in that he provided no **documentation** of a timely and complete recruitment effort as requested by the NOF. The CO concluded: ANo dates of contact were given in the original statement and no more have been given on rebuttal; we cannot tell from your statements whether timely contacts were made of the five qualified applicants.@ (AF 4-5).

Employer filed a Request for Reconsideration and Review by letter dated September 28, 2001. The Request for Reconsideration was denied on October 15, 2001 and the matter was referred to this Office and docketed on February 27, 2002. (AF 1-3).

DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. ' 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to Aprotect the American labor market from an influx of both skilled and unskilled foreign labor.@ *Cheung v. District Director, INS,* 641 F2d. 666, 669 (9th Cir., 1981); *Wang v. INS,* 602 F.2d 211, 213 (9th Cir. 1979).[3] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996); 20 C.F.R '. 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999)(*en banc*), A[u]nder the regulatory scheme of 20 C.F.R.

[3] The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien**=s entry for permanent employment. *See* S. Rep No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.**

Part 24, rebuttal following the NOF is the employer=s last chance to make its case. Thus, it is the employer=s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.@

In the instant case, employer failed to adequately rebut the issues raised by the CO in the NOF, and accordingly, labor certification was properly denied. In the NOF, the CO was specific both as to the finding and the necessary corrective action. The CO found the evidence submitted insufficient to establish that contact of the five qualified applicants took place, and instructed that Employer submit rebuttal evidence detailing his attempt(s) to interview these U.S. applicants. As was noted by the CO in his Final Determination, Employer did not respond to the NOF=s request for documentation of a timely and complete recruitment effort. No dates or any other specifics regarding contact were given in either the original recruitment report or on rebuttal. Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). On this basis, we conclude Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

ORDER

The Certifying Officer=s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.